No. 47.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

LAWRENCE CALLANAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

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OPINIONS BELOW.

The opinion of the Court of Appeals (R. 33-40) is reported at 274 F. 2d 601. The opinion of the District Court (R. 21-31) is reported at 173 F. Supp. 98.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 2, 1960 (R. 41). The petition for a writ of certiorari was filed on March 1, 1960, and granted on April 4, 1960 (R. 42). 362 U. S. 939. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Whether Congress intended that a person be subject to cumulative penalties for a single interference of interstate commerce by extortion and for conspiracy so to do, under the Hobbs Act, 18 U. S. C. 1951.

(2) Whether the doctrine of res judicata bars a criminal defendant from collaterally attacking a sentence of imprisonment in excess of that authorized by law if on his direct appeal from his conviction he fails to urge a question as to the legality of his sentence.

STATUTE AND RULE INVOLVED.

62 Stat. 793, 18 U. S. C., § 1951, provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the

presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

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Rule 35 of the Federal Rules of Criminal Procedure provides:

The court may correct an illegal sentence at any time • • •

STATEMENT.

In a two count indictment returned on March 3, 1954, in the United States District Court for the Eastern District of Missouri petitioner was charged with violating 18 U. S. C. 1951 as follows: Count 1 charged that, from March 1, 1951 until the date of the indictment, petitioner and four others did conspire to obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence and fear. Count 2 charged that, on the same dates, petitioners and the four others did obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence and fear (R. 1-9).

In a trial before a jury, the evidence upon behalf of the government was as follows: Defendants were labor union representatives; Petitioner for the pipefitters and the other defendants for the operating engineers, teamsters and laborers. On a 1951 pipe line construction project, the O. R. Burden Construction Company, which employed the crafts represented by the defendants, encountered numerous difficulties. The welders were working only four hours a day for a full day's pay; more men were put on the job than were necessary and labor costs were higher than for similar work in other comparable regions. In May, 1952, when the Burden Company was getting ready to start upon another project involving the construction of a new pipe line and the taking up of an old pipe line in Missouri and Illinois, a pre-job meeting was held with the defendants as representatives of the craft unions. Mr. Burden testified that, at the request of petitioner, he had lunch with petitioner alone; that at the luncheon, he told petitioner about his difficulties and said that something drastic would have to be done if his company was to com-

plete its project without great loss. He further testified that petitioner had asked him how much money there was on the job and whether there would be one cent a foot on the project, a rate which would total $28,000.00 or $29,000.00 on the whole job; that petitioner told him that the other crafts would share in the division but that the welders would get the greater share because they had not interfered with the construction company as had the other crafts and that he would talk to the other crafts. Burden told petitioner that no payment would be made until a substantial portion of the work was done and it was agreed that payments to the defendants would be made by false invoices. Burden also testified that, after the project had been started, at a private meeting with petitioner in August, 1952, he complained that defendants were not living up to the agreement, and that petitioner assured him that the work would pick up and that he would talk to the other crafts. The Burden Company paid $28,000.00 on invoices from various companies or individuals. Three defendants, Thompson, Poster and Secor, were shown to have received money from the Washington Equipment & Construction Company which submitted bills to Burden. Another defendant, Bianchi received two checks direct from Burden. There was testimony that a friend of petitioner set up a fictitious company which sent invoices to the Burden Company (R. 19-20). One Sariego testified that petitioner called Balch, an international union organizer, and told him to set up a fictitious company, the Pipe Line Welders Supply Company. Pipe Line Welders Supply Company invoices in the amount of $1606.40 and $1616.24 were sent to the Burden Company. Burden Corporation checks dated October 14 and October 30, 1952, each in the amount of $3,791.04, were sent to a mailing address in payment of these invoices (R. 17-18).

A jury found petitioner guilty on both counts. On July 19, 1954, he was sentenced to imprisonment for twelve years on each count, to run consecutively, but with sen-

tence on the second count suspended and the petitioner placed on probation for five years on that count (R. 10-11). The conviction was affirmed on appeal. 223 F. 2d 171, certiorari denied 350 U. S. 862.

On December 17, 1958, petitioner filed a motion for correction of sentence arguing that Congress did not intend that a person be subject to two penalties for a single obstruction of commerce by extortion and by conspiracy (R. 11-13).[1]

After a hearing (R. 14-20), the district court denied the motion, holding that the two counts charged separate offenses and that the sentence imposed was not illegal. It ruled that there was no illegality in the sentence under Count One and that any attempt to correct the suspended sentence under Count Two was premature since petitioner was not in custody under that sentence (R. 21-33). The Court of Appeals, relying on **Pinkerton v. United States**, 328 U. S. 640 and **United States v. Rabinowich**, 238 U. S. 78, affirmed holding that "when an accused is charged with conspiracy to commit a federal offense on one count and then in a second count is charged with the commission of a substantive offense which is the object of the conspiracy, the Indictment states two offenses, each of which is punishable." The court also held the rule of lenity inapplicable if conspiracy was charged in one count and a substantive act which was the object of the conspiracy in another. It also concluded that the proceeding could not be maintained because the issue was one which could have been, but had not been raised on direct appeal and, therefore was barred under the doctrine of res judicata (R. 33-40).

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[1] While the motion asked that the sentence be corrected under Count 1, the rule of the Eighth Circuit is that a court, if a sentence is excessive, may order the sentence under either count vacated even if relief is asked on one count only. Holbrook v. United States, 8 Cir., 136 F. 2d 649. The District Court considered the issue as to whether the sentence on either count should be corrected and concluded that any correction under Count 2 was premature.

SUMMARY OF ARGUMENT.

I.

Congress did not choose to punish cumulatively a substantive and conspirational violation of the Anti-Racketeering Act even though the commission of a substantive offense and a conspiracy to commit it may be separate crimes for which the legislature may provide aggregate punishment. The twenty year imprisonment provision is the maximum penalty for a single illegal interference with commerce whether the restraint is in form of a conspiracy or not. The wording of the Act and its legislative history demonstrate that consecutive punishment was not intended.

The initial 1934 Anti-Racketeering Act forbade interference with interstate commerce in the manner described by its four loosely drawn subsections. These provisions overlapped and made illegal robbery and extortion equivalents, physical violence or threats thereof in furtherance of a plan or purpose to violate the act and conspiracy or concerted action to violate the act. Since happenstance could determine whether a single interference with commerce might violate more than one provision, it is more reasonable to conclude that the prohibited means were meant to cover all variety of offender rather than to multiple punishment if particular conduct was covered by more than one provision. The 1946 amendement contained a similar overlap and its revision in the Criminal Code in 1948 was not designed to change its substance.

The Act was directed at one evil racketeering and was designed to stamp out rackets and racketeers The language employed merely verbalized a legal definition of racketeering.

The legislative history shows that one punishment was intended for a single interference with commerce. The

initial draft of the Act in 1934 provided for indefinite punishment for any violation, imprisonment of up to 99 years and a fine at least equal to the unlawful gain. It omitted a requirement of combination to avoid the difficulties of proving that the acts of racketeers affecting commerce amounted to a conspiracy. After this bill had passed the Senate, labor representatives secured a redraft which excepted labor activity. The redraft added without explanation provisions prohibiting concerted action, conspiracy, and acts of physical violence in furtherance of a plan. An amendment offered on the floor of the House prior to passage reduced its maximum penalty to 10 years and a $10,000 fine.

The primary reason for the 1946 Act was to eliminate the labor exemption provisos which had been construed by this Court in **United States v. Local 807**, 315 U. S. 521. Immediately following that decision, a series of bills were introduced in Congress designed to eliminate the labor exemption. Following hearings in 1942 before a House Committee, Representative Hobbs, the sponsor, in commenting upon statements concerning the alleged severity of the penalty provided in the bill, noted that its punishment provisions of 20 years and a $10,000 fine were designed to fit the crime up to the full extent of these maximum limits. This bill also proscribed against a criminal interference with interstate commerce during the war in a title that contained no special conspiracy provision. The committee report, by noting that the same punishment was provided for peacetime and wartime obstructions of commerce is another indication that aggregate punishment was not intended. At the next Congress, the 78th, the bill was again introduced. In debates before the House, Mr. Hobbs again asserted that the twenty year imprisonment provision was the maximum. Throughout the House debates there was a Congressional understanding that a single punishment of 20 years was the maximum imprisonment in-

tended. The bill passed the House but the Senate did not act upon it. The same bill was introduced at the 79th Congress. Again in the House debates it was generally understood that the maximum penalty provided by the act was 20 years. After the bill passed the House, the Senate passed it without debate and it became law in 1946.

The bill was amended in 1948 in the revision of the Criminal Code but there was no intent to change its meaning.

II.

At least the Congressional intent as to cumulative punishment is ambiguous and therefore the policy of lenity should be applicable. No judicial doctrine concerning conspiracy and its substantive offense precludes its application. At the time of the enactment of the Anti-Racketeering Act, this Court had concluded, in cases involving the general conspiracy statute, that a conspiracy and its substantive offenses were separate crimes which might be subject to different statutes of limitations, to different penalties and that neither offense merged into the other. In at least one instance, Congress in providing for a heavier penalty for a specific conspiracy than imposed by the general conspiracy statute assumed that consecutive penalties might not be imposed by a conspiracy and its substantive offense. There is thus no generalized judicial doctrine recognized by Congress that a conspiracy and its substantive offense are to be aggregately punished.

Even if Congress intended cumulative punishment for violating the general conspiracy statute and the commission of a substantive crime, its omission of a Hobbs Act conspiracy from that statute was not designed to authorize a greater cumulative punishment. Significantly, the 1948 revision of the Criminal Code omitted various specific conspiracies from the 5 year penalty imposed by the gen-

eral conspiracy statute for the purpose of providing a heavier penalty. The Hobbs Act was not so excluded. This is a further indication that it is a unique statute of limited purpose.

III.

The validity of consecutive sentences on two counts of an indictment may be raised by a motion under Rule 35, F. R. Cr. P., after affirmance of the conviction. The government has so conceded in its statement opposing certiorari and this Court has so held in **Heflin v. United States**, 358 U. S. 415, 418, 422.

ARGUMENT.

I.

The Language And Legislative History Of The Anti-Racketeering Act Indicates That Congress Did Not Intend To Punish Cumulatively The Interference Of Interstate Commerce By Extortion And A Conspiracy So To Interfere With Commerce.

Introduction.

The Court below assumed that since Congress has the power to punish cumulatively the commission of a substantive offense and a conspiracy to commit the substantive offense[2] that Congress therefore intended that such double punishment may be imposed. In reaching this conclusion the Court misinterpreted the essence of the lenity cases. In all those cases, after it was conceded or decided that Congress had the power to provide for cumulative punishment for offenses arising out of a single factual situation, the question resolved itself as to whether Congress intended that consecutive punishment might be imposed. While the lenity cases involved substantive crimes, the same problem of Congressional intent is applicable whether a single statute proscribes against concerted or individual conduct. The fact that a commission of a substantive offense and a conspiracy to commit it may be separate and distinct crimes and that Congress if it wishes can provide that each offense be either punished singly or aggregately does not mean that Congress when it enacted the instant statute intended that a defendant be punished doubly for both a substantive offense and a conspiracy.

We do not here have a case where the conspiracy arises under the general conspiracy statute, 18 U. S. C. 371, and

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[2] Pinkerton v. United States, 328 U. S. 640.

the substantive offense under a separate statute enacted at a different time. Rather, we have a situation where Congress chose to enact a single statute to cover all forms of unlawful interference with commerce. The single statute here involved is the Hobbs Act, 18 U. S. C. § 1951, which makes it a crime to unlawfully interfere with interstate commerce. It is petitioner's position that there can be but a single punishment for a single interference with commerce, whether the acts affecting interstate commerce amount to a conspiracy in restraint of such commerce or not. This is so because Congress did not intend to punish aggregately the obstruction of commerce by extortion and the conspiracy to so obstruct commerce. While the bill was aimed at criminal gangs and was designed to curb rackets and racketeering, the substantive provisions omitted a requirement of combination to avoid the difficulties of proving that the acts of organized groups amounted to a conspiracy to interfere with commerce.

An examination of this statute significantly known as the Anti-Racketeering Act in the light of its legislative history suggests the application of the rule of lenity. Originally it was enacted in 1934.[3] It was amended in 1946 by the Hobbs Act.[4] It was modified again in 1948 when the entire criminal code, Title 18, was enacted into positive law.[5] The legislative history as to punishment could be more complete. But there is nothing to suggest that Congress intended by this single statute multiple punishment for the obstruction of commerce by extortion and for conspiracy so to do.

1. **The 1934 Act.** The Copeland Act (Appendix p. 5) provided in Section 2 that any person who in connection with any act affecting commerce "(a) obtains or attempts

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[3] Act of June 18, 1934, C. 569, §§ 1-6, 48 Stat. 979.

[4] Act of July 3, 1946, c. 537, 60 Stat. 420.

[5] Act of June 25, 1948, c. 645, 62 Stat. 793.

to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money . . .''; or "(b) obtains the property of another, with his consent induced by wrongful use of force or fear . . .''; or "(c) commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate section (a) or (b)''; or "(d) conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both''.

There was an overlap in each of the subsections. Obtaining property by wrongful use of fear covered by subsection (b) embraces obtaining money by coercion covered by subsection (a). A person who threatens to commit an act of physical injury in furtherance of a purpose under subsection (c) is attempting by the use of force to obtain money under subsection (a). A plan under subsection (c) overlaps the conspiracy under subsection (d). Indeed it may be that in order to violate the conspiracy section, it was necessary that a person commit or threaten to commit an act of physical violence in furtherance of the conspiracy.[6] A person who acts concertedly under subsection (d) would also violate the other subsections.

The loose nature and overlap in the statute was noted by Judge Learned Hand in his opinion in **United States v. Local 807**, 2 Cir., 118 F. 2d 684, 686:

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[6] As pointed out below subsections (c) and (d) were added at the same time. This may indicate that a conspiracy under this statute requires an overt act. But if the statute punishes conspiracy "on the common law footing" as suggested in *Ladner v. United States*, 5 Cir., 168 F. 2d 771, 773, cert. den., 335 U. S. 827, this in itself is an additional reason for concluding that cumulatively punishment was not intended. It is likely that Congress in the absence of legislative evidence intended that a conspiracy which did not manifest itself by an overt act would be punished the same way as an attempt in the event the crime was completed.

". . . . The whole statute is very loosely drawn and we are not sure what subdivision (b) does add to subdivision (a), beyond making it an offense to extort 'property • • • under color of official right'. 'Property' in subdivision (b) presumably includes 'money' in subdivision (a) and, the phrase, 'consent induced by wrongful use of force or fear' in subdivision (b) must include a 'threat to use force', in subdivision (a); if so the two subdivisions to some extent appear to overlap. However that may be, we cannot suppose that the exaction of wages by a 'bona fide employee' is forbidden by subdivision (b) after being expressly excepted from subdivision (a). We can attach no meaning to the third and fourth counts."

The exception contained in subsection (a) "not including, however, the payment of wages by a bona fide employee" was not limited merely to subsection (a) but was held to be applicable to each of the subsections by this Court in **United States v. Local 807**, 315 U. S. 521. "Attempt" was made a crime only in subsection (a). Yet, as was the labor exception, it was obviously designed to apply to the entire act.

The organization of the statute into four subsections of proscribed conduct does not mean Congress intended that a transaction which violated more than one subsection was aggregately punishable. Rather, in reading the loose overlapping statutory language, it seems more reasonable to conclude that Congress by enacting these subsections meant to cover all types and variety of offender rather than to multiply punishment if a particular violator happened to violate more than a single subsection and intended, by the wording of the statute, a single punishment for conspiracy and for a violation of this act involving a single interference. Certainly Congress did not wish to punish consecutively conduct which is forbidden by more than one subsection due to the statutory

overlap. Any person who obtained money by force would not have been subject to two penalties because his conduct was forbidden by both subsections (a) and (b). Nor would any person who acted concertedly with another and violated those sections be punished twice. It is also unlikely that Congress by this language intended multiple punishment for persons who threatened to commit an act of physical violence "in furtherance of a plan or purpose to violate sections (a) or (b)", even though their conduct may have violated each subsection. It is further not reasonable to assume that if the plan was a conspiracy, an additional penalty was authorized. And if one of the charges was "attempt", consecutive punishment with a completed crime was not desired. Reading the language as not authorizing cumulative punishment would thus accord with a commonsensical view of the statute and would avoid inequities in punishment caused by a literal interpretation. Congress apparently intended to establish a single code to deal with racketeering activities of concern to the nation whether conspiratorial, concerted or otherwise.

Its history supports this conclusion. From the outset it is clear that the anti-racketeering act was primarily directed against gangs and organized crime. Its purpose was "to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types." **United States v. Local 807**, 315 U. S. 521, 530. The gangs were designed as racketeers and the crimes that they committed as racketeering. The evil sought to be corrected was the interference with interstate commerce by the criminal activities of these unlawful groups.

On June 12, 1933, the Senate adopted a resolution (S. Res. 74) directing the Committee on Commerce to investigate racketeering.[7] Hearings were held, during which

[7] The resolution specifically mentioned that newspapers were carrying "accounts of 'beer rackets', 'poultry rackets', 'milk rackets',

the term racketeering was generally defined as extortion practiced by organized groups. For example, Joseph Keenan, Assistant Attorney General of the United States defined racketeering as follows: "It is the organized use of threats, coercion, intimidation and use of violence to compel the payment for actual or alleged services of arbitrary or excessive charges under the guise of membership dues, protection fees, royalties, or service rates, the cloak of blackmail and extortion." Professor Franklin E. Russell had this view: "Racketeering is an organized conspiracy to commit the crimes of extortion or coercion, or attempts to commit extortion or coercion, within the definition of these crimes found in the penal law of the State of New York and other jurisdictions. Racketeering, from the standpoint of extortion, is the obtaining of money or property from another, with his consent, induced by the wrongful use of force or fear. The fear which constitutes the legally necessary element in extortion is induced by oral or written threats to do an unlawful injury to the property of the threatened person by means of explosives, fire, or otherwise; and to kill, kidnap or injure him or a relative of his or some member of his family. Racketeering, from the standpoint of coercion, usually take the form of compelling, by use of similar threats to person or property, a person to do or abstain from doing an act which such other person has the legal right to do or abstain from doing, such as joining a so-called 'protective association to protect his right to conduct a business or trade.' Coercion as such does not necessarily involve the payment of money, but frequently both extortion and coercion are involved in racketeering."[8]

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other 'food rackets', 'laundry rackets', 'drug rackets', and other similar schemes for the exploitation, deception and terrorizing of our citizens" 77 Cong. Rec. 4741, 5716-5717.

[8] Hearings before Senate Subcommittee pursuant to Senate Resolution 74, 73d Cong., 2d Sess. (1933), pp. 4 and 8.

Following the hearings, on January 11, 1934, Senator Copeland, as chairman of the subcommittee of the Committee on Commerce, popularly known as the Committee on Racketeering, introduced for the committee some thirteen bills for consideration by the Congress, including S. 2248 the first draft of the Anti-Racketeering Act entitled a bill "to protect trade and commerce against interference by violence, threats, coercion, or intimidation."

As introduced, S. 2248 provided that any person who committed any of the proscribed acts "shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ninety-nine years and, in addition, by a fine which shall be at least commensurate with the amount of the unlawful gain." It extended federal jurisdiction to permit prosecution of racketeers for acts constituting racketeering by embodying very general prohibitions against violence, extortion and coercion, including a provision making it an offense for any person who "coerces or attempts to coerce any person, firm, association or corporation to join or not to join an association, firm, corporation or group, or to buy or rent commodities or services from particular sources, persons, firms, or corporations or to make payments directly or indirectly to any person, association, firm, corporation or group except for a bona fide consideration." It contained no conspiracy section and no specific mention of wages or labor (Appendix, pp. 1-3).

During its introduction, the Senate's attention was directed to a memorandum written by Walter L. Rice, Special Assistant to the Attorney General setting forth the purpose of the bill:[9]

> "The accompanying draft of the proposed Federal Anti-Racketeering Statute is designed to extend fed-

[9] 78 Cong. Rec. 448 (1934).

eral jurisdiction sufficiently to permit prosecution of so-called 'racketeers' for acts constituting racketeering.

In the past such persons have been prosecuted in the Federal courts for incidental violations of law, such as mail frauds or income-tax evasions. The nearest approach to prosecution of racketeers as such has been under the Sherman Anti-Trust Act. This Act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because of the many limitations engrafted upon the act by interpretation of the courts, the Act is not well suited for prosecution of persons who commit acts of violence, intimidation, and extortion. Furthermore, the Sherman Act requires proof of a conspiracy, combination or monopoly, and it is often difficult to prove that the acts of racketeers affecting interstate commerce amount to a conspiracy in restraint of such commerce, or a monopoly. Moreover, a violation of the Sherman Act is merely a misdemeanor, punishable by 1 year in jail plus $5,000 fine, which is not a sufficient penalty for the usual acts of violence and intimidation affecting interstate commerce.

The accompanying proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretations of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal government's constitutional powers. Such restraints if accompanied by extortion, violence, coercion, or intimidations are made felonies, whether the restraints are in form of conspiracies or not. The proposed statute also makes it a felony to do any act 'affecting' or 'burdening' such trade or commerce if accompanied by extortion, violence, coercion or intimidation.

The provisions of the proposed statute are limited so as not to include the usual activities of capitalistic

combinations, bona fide labor unions, and ordinary business practices which are not accompanied by manifestations of racketeering.

Offenses of the character designed to be prohibited are of such a serious nature that it is believed proper to make them felonies, punishable by imprisonment for not less than 1 year and for as long as the court in its discretion shall determine, and in addition by a fine at least commensurate with the amount of the unlawful gain. In one racketeering case prosecuted under criminal provisions of the Sherman Act the unlawful gain was estimated to exceed $10,000,000 per year, but the fine was limited by the act to $5,000 for each person convicted. Under such circumstances it might be said that crime does pay. The penalty here suggested would cancel the benefits derived from the unlawful venture."

The Senate Committee report set forth this memorandum and nothing else.[10] This memorandum was also read by Mr. Stephens of the committee during the brief discussion prior to the passage of the bill in the Senate.[11]

It may be concluded that this Act was initially drafted to extend federal jurisdiction sufficiently to prosecute racketeers, that it covered all interferences with commerce if accompanied by extortion, violence, coercion or intimidation "whether the restraints are in form of conspiracies or not", that it was designed to cover situations where it was difficult to prove conspiracy or combination and that indefinite punishment was provided for any violation. Under such circumstances, it is not likely that Congress intended to punish a single interference doubly if a single transaction or course of conduct violated more than one section.

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[10] S. Rep. No. 532, 73d Cong. 2d Sess.

[11] 78 Cong. Rec. 5734-5735.

After the bill had passed the Senate, labor representatives expressed fear that the bill in its then form might result in serious injury to the labor movement,[12] and the measure was redrafted by officials of the Department of Justice after conferences with labor officials. In the course of this revision, the bill assumed substantially the form in which it was eventually enacted. In particular the provisions "conspires or acts concertedly with any other person or persons to commit any of the foregoing acts" and "commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate Sections (b) or (c) herein" were added. The bill retained the one to ninety-nine year imprisonment and the indefinite fine provision "at least commensurate with the unlawful gain". On behalf of labor, the new bill excepted "the payment of wages to a bona fide employee and contained a proviso preserving "the rights of bona fide labor organizations (Appendix pp. 3-4).

In the favorable report on the revised bill, H. R. Rep. No. 1833, 73d Cong. 2d Sess., the House Committee on the Judiciary set forth without comment a letter from the Attorney General to the committee, dated May 18, 1934. After informing the committee that the draft of the substitute bill was approved by labor, the letter continued:

> "We believe that the bill in this form will accomplish the purposes of such legislation and at the same time meet the objections made to the original bill.
>
> The original bill was susceptible to the objection that it might include within its prohibition the legitimate and bona fide activities of employers and employees. As the purpose of the legislation is not to interfere with such legitimate activities but rather to set up severe penalties for racketeering by violence,

[12] 78 Cong. Rec. 5859.

extortion, or coercion, which affects interstate commerce, seems advisable to definitely exclude such legitimate activities. As the typical activities affecting interstate commerce are those in connection with price-fixing and economic extortion directed by professional gangsters, we have inserted subparagraphs (a) and (b), making such activities unlawful when accompanied by violence and affecting interstate commerce.

The Sherman Anti-Trust Act is too restricted in its terms and the penalties thereunder are too moderate to make that Act an effective weapon in prosecuting racketeers. The Anti-Racketeering Bill would extend the federal jurisdiction in those cases where racketeering acts are related to interstate commerce and are therefore of concern to the nation as a whole.

We have added a new provision prohibiting conspiracy as well as the substantive acts and we have also added a separability clause to make certain the entire act will not be declared unconstitutional in the event that its application to any circumstance is held invalid.

We feel that this bill is a vital part of any federal program to suppress so-called 'racketeering' activities which have assumed nationwide proportions."

When the revised bill was brought before the House, the debate was limited to less than a column of the Congressional Record and consisted of one member's demanding and receiving assurance that an exemption for labor was applicable and was satisfactory to organized labor.[13] Representative Oliver offered an amendment to the committee amendment which was adopted without discussion. In lieu of punishment provisions "from 1 to 99 years, and in addition, by a fine which shall be at least commensurate

[13] 78 Cong. Rec. 10867, 11402-11403.

with the amount of the unlawful gain", it substituted "10 years or by a fine of $10,000 or both."[14] After it was passed in the House, the Senate concurred in the bill without debate and without division.[15] While the bill awaited the signature of the President, Senator Copeland submitted a report in which he referred to § 2248 as one of 11 bills which had been enacted as a result of the activities under Senate Resolution 74 of the subcommittee of the Committee of Commerce, popularly known as the "committee on racketeering" and it related activities under Senate Resolution 196 making it a "committee on crime and criminal practices."[16]

The principal reason for the bill substituted by the House was to eliminate any prohibition upon the legitimate activities of labor unions. The addition of the provision prohibiting conspiracy was without explanation. This change does not warrant an inference that it was for the purpose of providing for cumulative punishment for the commission of a conspiracy and the substantive crime. Indeed at the time of the modification, the punishment provisions of 99 years imprisonment and a fine at least commensurate with the amount of the unlawful gain remained. Such indefinite punishment compels the conclusion that only a single punishment was sought. Coupled with this is the fact that the statute is directed against one specific evil, racketeering related to interstate commerce, whether in the form of a combination or otherwise. Since the same evil is the basis of both a prosecution for conspiracy and for a substantive crime under the act, it is more reasonable to conclude that only alternative penalties were intended. Indeed since there would have been

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[14] His amendment also deleted paragraph (a) of Section 2 of the revised bill.

[15] 78 Cong. Rec. 11482.

[16] S. Rep. No. 1440, 73d Cong., 2d Sess.

only a single unlawful gain in a conspiracy that terminated in a completed crime, the minimum fine provision, an amount equal to the unlawful gain, also argued against double punishment.

The House Committee's version of the bill recognized that individuals had been coerced to join groups and had been forced to pay tribute to groups. This in itself was an indication that Congress did not mean to punish group action more severely than individual action but meant to leave the punishment to the discretion of the Court.

The penalty provision was reduced by amendment in the House to a maximum imprisonment of ten years and a maximum fine of $10,000. Again we have a change without explanation. But it does not warrant an inference that consecutive penalties were now authorized.

2. **The 1946 Act** (Appendix p. 23). Section 1 of the 1946 Act defined commerce, robbery and extortion. The definition of robbery and of extortion were similar to that of Section 2 (a) and 2 (b) respectively of the 1934 Act. Again robbery and extortion overlapped. Section 2 made it a crime to obstruct commerce by robbery or extortion. Sections 3, 4 and 5 made it a crime "to do anything in violation of Section 2". Section 3 covered anyone who "conspires with another or with others, or acts in concert with another or with others", Section 4 included "whoever attempts or participates in an attempt" and Section 5 embraced any person who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose". Again there are the other overlaps. A "plan" under Section 5 overlapped the conspiracy described in Section 3. Concerted action in Section 3 also would violate either or all of the other parts of the act relating to robbery, extortion, conspiracy and threats in furtherance of a plan. Section 6 provided: "Whoever violates any section of this title shall, upon conviction

thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both." This punishment clause was equivocal as to whether cumulative or alternative punishment was intended.

The most significant change was the elimination of the labor exemption. The prime purpose of the 1946 amendment was designed to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship.[17] It was passed after this court had construed the 1934 Act in **United States v. Local 807, 315 U. S. 521.** In that case the union and some of its members were convicted of conspiracy to violate the Anti-Racketeering Act. They had conspired to use and did use violence and threats to obtain money (amounting to the regular union rates for a day's work of driving and unloading) from the owners of trucks passing from New Jersey to New York. In some instances they assisted or offered to assist in unloading the truck and in others they offered no services after the money was paid. This court reversed the conviction holding that, under the proviso excepting from punishment any person who obtains or attempts to obtain by force or the threat of force the payment of wages by a bona fide employer to a bona fide employee, defendants were not guilty if their objective was to become bona fide employees and to obtain wages in that capacity, even though they may fail of their purpose.

This Court decided the Local 807 case on March 2, 1942. Within a week after the decision of this Court two bills were introduced in Congress looking towards an amendment to the Anti-Racketeering Act of 1934.[18] Shortly thereafter, Representative Hobbs introduced H. R. 6872

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[17] United States v. Green, 350 U. S. 415, 418-419.

[18] H. R. 6753, 77 Cong. 2d Sess. and S. 2347, 77 Cong. 2d Sess. were not reported out of committee They each would have simply deleted the labor exception.

(Appendix pp. 7-8) and H. R. 7067 (Appendix pp. 8-11). Both bills provided for a twenty year penalty.[19] The latter bill was introduced on May 11, 1942[20] after hearings were held before a subcommittee of the House Committee on the Judiciary.[21] H. R. 7067 proscribed against acts identical with the bill, H. R. 32, 79th Cong. 1st Sess., which finally passed in 1946 except for two particulars. The bill contained a title which forbade interference with troops and supplies in commerce during wartime and the proviso that it shall not affect four laws in the labor relations field was only applicable to this title. The hearings were largely addressed to alleged evils committed by labor unions, particularly the Teamsters' Union.

At the conclusion of the 1942 hearings before the House Committee, Mr. Hobbs, the sponsor of the bills, made the following statement in regard to the bill then under consideration (pp. 426-427):

> Mr. Hobbs: Now, then, I want to be heard just a minute on H. R. 6872 as a witness. The first statement I would like to make with regard to the bill is to call your attention to the title, "to protect trade and commerce against interference by violence, threats, coercion, or intimidation."
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> That answers the contention made by several witnesses as to the language of the bill. In aid of their

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[19] H. R. 6872, 77 Cong. 2d Sess. was substantially like the 1934 act except that it eliminated the labor exception. It also forbade in addition to money or other valuable consideration "protection or protective service, or the expressed or implied promise thereof; or the purchase or rental of property."

[20] 88 Cong. Rec. 4080.

[21] Hearing before subcommittee of the Committee of the Judiciary, House of Representatives, 77th Cong., 2d Sess. on H. R. 5218, H. R. 6752, H. R. 6872 and H. R. 7067. H. R. 5218 was a bill to confer jurisdiction on the United States in cases involving work stoppages and for other purposes. H. R. 6752 was a bill to confer jurisdiction in the United States courts in cases involving work stoppages for illegitimate and non-labor purposes.

contention they say that this proposed Federal law is not necessary because the State statutes already cover the ground. The State statutes seek to punish in the regular way those persons who are found guilty, after the machinery of the courts has ground, of those crimes which are denounced by State law. The purpose of this law is entirely different. It is to protect interstate commerce from criminal interference. Here, the prime purpose is not to punish a criminal for his crime against State law, but rather to punish interference with interstate commerce by robbery or extortion. This bill would invoke the aid of the Federal authorities to prevent the commission of those crimes and to protect interstate commerce.

In the second place, I wish to call your attention to the fact that the elements of the crime denounced by this bill are essentially the same as the elements of robbery or extortion. The only added element is interference with interstate commerce. In order to amplify and clarify, I am seriously considering a revision of H. R. 6872 so that it will denounce interference with interstate commerce by robbery or extortion in haec verba. Of course, the revised bill should include conspiracy and attempts to commit such a crime, but the essence would be interference with interstate commerce by robbery or extortion.

In the revised bill, I shall probably include as a separate title, the life of which would be limited to the duration of the war, the amendment suggested by Hon. Joseph B. Eastman in our hearings this morning.

Criticism has been made of the alleged severity of the punishment described in H. R. 6872. Such criticism loses its point, however, when it is considered that in several States of the Union the punishment for robbery is fixed at death and that the 20-year maximum sentence authorized by my bill is about the

average. The crime of extortion also is punishable by some such length of imprisonment. So I do not think it can be fairly said that the punishment prescribed by my bill, a fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both, is too severe. Under it, one found guilty could be sentenced to pay a fine of 1 cent, without imprisonment, but in the sound discretion of the court the punishment could be made to fit the crime up to the full extent of the maximum limits.

Therefore, in the light of the testimony and admissions contained in the record of the hearings we have been holding, I feel sure that we can agree that those persons who have been impeding interstate commerce and levying tribute from free-born American citizens engaged in interstate commerce shall not be permitted to ply their racket without a sincere attempt on the part of Congress to do its duty of protecting interstate commerce.

H. R. 7067 was reported by the committee after making amendments reducing its maximum penalty to ten years.[22] The report, H. R. Rep. No. 2176, 77 Cong., 2d Sess., stated:

> The purposes of these bills are (1) to prevent interference with interstate commerce by robbery or extortion, as defined in the bill, and (2) to prevent interference during the war with the transportation of troops, munitions, war supplies, or mail in interstate or foreign commerce. . . .
>
> Title I.
>
> This title is an amendment of the existing anti-racketeering law which was enacted in 1934. It was

[22] The committee amendment also struck out "or the preparation of any article or commodity for commerce."

passed in an effort to eliminate racketeering in relation to interstate commerce, and of concern to the nation as a whole. That statute came under examination of the Supreme Court recently in United States v. Local 807 and the opinion in that case is set out in full, both the majority opinion and the dissent:

* * * * * * * *

(Local 807 opinion contained in report is omitted.)

* * * * * * * *

The objective of Title I is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion as defined in the bill. A conspiracy or attempt to do anything in violation of Section 2 is likewise made punishable, as is the commission or threat of physical violence to any person or property in furtherance of a plan to violate Section 2.

A penalty is prescribed of imprisonment for not more than 10 years or a fine of not more than $10,000, or both, upon conviction of violating any section.

Title II.

This Title was suggested by the director of the office of Defense Transportation, Hon. Joseph B. Eastman. The provisions of this Title were embodied in a world war statute (40 Stat. 274; par. 23 of Sec. 1 of the Interstate Commerce Act), which was effective during that war. The statute applied to shipments by railroads and the provisions contained in Title II of the present bill have been expanded to apply also to other forms of transportation. Instances were cited in the hearings showing the necessity for and desirability of this title of the bill. The prior statute is shown as an exhibit at the conclusion of this report

for purposes of comparison. The same punishment prescribed for violating any section of Title I is prescribed for violating Title II.

* * * * * * * *

The report also contained the following statement:

> In the light of the testimony and admissions contained in the hearings and of the above quoted provisions of the Constitution, there must be agreement that those persons who have been impeding interstate commerce and levying tribute from free-born American citizens engaged in interstate commerce shall not be permitted to continue such practices without a sincere attempt on the part of Congress to do its duty in protecting interstate commerce.
>
> "This bill would outlaw two kinds of criminal interference with interstate commerce in war or peace and any kind of interference with the movement of troops or war material and interstate commerce during war. The committee on the judiciary respectfully commends this bill, with the committee amendments, to the favorable consideration of the House."

A minority report was also filed with the bill. There was no further action on the bill in that Congress.

It is to be noted that the report states that the "same punishment prescribed for violating any section of Title I is prescribed for violating Title II". Title II covered criminal interference with commerce in war but contained no conspiracy provision. It would be incongruous to say that Congress intended that a peacetime conspiratorial and substantive interference with commerce was to be subject to a greater penalty than a war time interference. Yet that would have been the result if consecutive penalties were applicable.

At the beginning of the 78th Congress on January 6, 1943, Representative Hobbs introduced H. R. 653, a bill

identical with the original draft of H. R. 7067 with a 20 year imprisonment provision.[23] On January 28, 1943, the bill was reported by the House Committee. The committee report, H. R. Rep. No. 66, 78 Cong., 1st Sess., noted that the bill was a successor bill to H. R. 6872 and H. R. 7067 of the Seventy-seventh Congress. The report was substantially identical to H. R. Rep. No. 2176 of the prior Congress and substituted the 20 years imprisonment in place of 10 years imprisonment in the prior report.[24] The minority report, signed by Representatives Celler and Lane, after noting that the intent of the bill was "to impose severe criminal restrictions upon the activities of labor unions stated in part:

> However, even if these were normal peace times there has, in our opinion, been a complete failure of any showing requiring so drastic a Federal police measure affecting all labor unions throughout the country. Please note penalties of not more than 20 years imprisonment are prescribed. In this period of grave national emergency the bill is not only unnecessary to meet any alleged evil; it would, if passed, make serious inroads in our constructive labor policy with a consequent interference with full war production. In brief, the bill is at best dangerously ill-timed.

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[23] 89 Cong. Rec. 23.

[24] Again as in H. R. 7067, the committee amendment struck out "or the preparation of any article or commodity for commerce" from the definition of commerce.

A supplemental report of the committee was submitted by Mr. Summers of Texas relative to the proviso that nothing shall be construed to repeal, modify, or affect certain designated sections of the Clayton Act, Norris-La Guardia Act, the Railway Labor Act or the National Labor Relations Act. It was decided that this should be made applicable to Title I as well as Title II and the proviso was then set forth as Title III. H. R. Report No. 66, Part 2, 78th Cong., 1st Sess.

The 1943 bill was passed by the House after debate[25] but the Senate took no action on the bill. In the House debate on the bill Congressman Hobbs, the sponsor, in answering objections to the punishment in the bill, stated (89 Cong. Rec. 3218):

> "Another opposition argument frequently employed is that the punishment prescribed in this bill is too severe. The answer is that the crimes of robbery and extortion are not trivial. They are major felonies, heinous offenses. Only when the interference with interstate commerce, condemned by this bill, is accomplished by means so criminal as to be within the definitions of robbery and extortion is any punishment stipulated. But the argument that the punishment prescribed is too severe ignores the fact that it is only the maximum. Any punishment less than this maximum may be imposed by the Court. A fine of 1 cent or a sentence of 1 minute in jail is just as much a punishment under the provisions of this bill as is the maximum. This bill simply enables the Court that heard the evidence and knows the details of each case to make the punishment fit the crime. It is interesting to note, however, that a number of states have fixed the maximum punishment for robbery at death. The maximum fixed in this bill is about the average. Take New York, for instance. The definition of robbery contained in this bill is substantially copied from the New York statute. Yet New York has fixed the minimum punishment for first-degree robbery at 10 years and the maximum punishment at 30 years. This bill contains no minimum punishment and fixed the maximum mid-way between the two New York limits."[26]

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[25] 89 Cong. Rec. 3161-3164, 3192-3230.

[26] Until 1950 the general conspiracy statute in New York which included a conspiracy to extort was only a misdemeanor. N. Y. Penal Law, § 580.

Later, in arguing against an amendment which would have reduced the maximum penalty from 20 years to 10 years, Mr. Hobbs urged (89 Cong. Rec. 3229):

> Mr. Chairman, the punishment fixed in this bill is a maximum, and any punishment imposed by a judge of 1 cent or 1 hour in jail would be covered by this maximum penalty just the same. May I point out to the House again that this bill was copied substantially from the New York statute which punishes first-degree robbery by a minimum punishment of 10 years and a maximum of 30 years. We took the average of 20 as a maximum with no minimum. I think the gentleman is amply protected in his desire for the penalty to be reasonable and all we are doing is giving the Court the right to make the punishment fit the crime.

It is apparent that the sponsor considered 20 years as a reasonable maximum penalty and that he did intend that consecutive penalties be imposed for a conspiracy and a substantive violation. Moreover, throughout the debates, a Congressional understanding that 20 years was the maximum penalty is apparent. Opposition was expressed to the severe penalty of "up to 20 years" imposed by the bill and that this penalty might be imposed on persons engaged in concerted activity (Appendix pp. 12-19). 89 Cong. Rec. 3162, 3194, 3201, 3204, 3207-3208, 3223, 3226, 3229. No one arose to argue that the penalties which might be imposed on those who acted concertedly might be doubled if the jury found the group activity was also a conspiracy.

On January 3, 1945, at the 79th Congress, Mr. Hobbs introduced H. R. 32, the bill which was enacted as the 1946 law.[27] This bill was identical with the amended version of H. R. 653 which the House had passed during the 78th

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[27] 91 Cong. Rec. 10

Congress. Shortly thereafter, Mr. Hobbs, from the Committee of the Judiciary, submitted a report on the bill. H. R. Rep. No. 238, 79th Cong., 1st Sess. This report, also entitled "Amending the Antiracketeering Act", noted that it was a successor bill to H. R. 6872 and H. R. 7067 of the Seventy-Seventh Congress and of H. R. 653 of the Seventy-Eighth Congress, "which was favorably reported by the committee and passed by the House." The report was otherwise identical with the prior House report in the previous Congress with one exception. It contained a short comment upon Title III of the bill stating it was not intended to prevent the doing of acts authorized by the four acts mentioned in that title and that it should not be interpreted "as authorizing any unlawful acts, particularly those amounting to robbery or extortion". There also was no minority report.

Again in the House debates on H. R. 32 it was generally understood that the maximum penalty provided by the act was 20 years. Several Congressmen argued that the bill provided for imprisonment up to 20 years and/or fine of $10,000.[28] 91 Cong. Rec. 11845, 11846, 11901, 11902, 11916, 11917. Reference was that to the hearings held in 1942. 91 Cong. Rec. 11841. The conspiracy conviction in the Local 807 case occupied a good part of the debate. 91 Cong. Rec. 11841. The House debates in their entirety indicated that the bill was primarily directed against labor practices and labor unions. The application of the bill to group action was noted throughout. For example, Mr. Robsion stated "it does not apply to labor unions alone, it applies to any group of men that are interfering with interstate commerce, whether they be labor unions, farm organizations, or anybody else". 91 Cong. Rec. 11843. There was further reference to the 807 case. 91 Cong. Rec. 11844, 11847-11848, 11905, 11907, 11912, 11913,

[28] 91 Cong. Rec. 11839-11847, 11899-11922

11915. It was noted that the definition of robbery and extortion followed the definition contained in the laws of the state of New York. 91 Cong. Rec. 11900. There was reference to the conspiracy and acting concertedly provisions of both the new and old acts. 91 Cong. Rec. 11901-11902. Mr. Celler argued that in certain circumstances, all members of the union may be involved because it might be found that they either conspired or acted in concert with other members of the union. 91 Cong. Rec. 11901-11902. Again the debate showed the prime purpose of the bill was to protect interstate commerce from robbery and extortion. The main issue in the debate was whether or not and to what extent labor unions should be excepted from the operation of the act. In arguing for the bill, Mr. Robsion stated that the definitions of robbery and extortion were those used in New York, 91 Cong. Rec. 11905, and further contended that the crimes of robbery and extortion were not confined to racketeers in the labor movement but that groups of farmers had on occasion been racketeers as well as other groups. 91 Cong. Rec. 11906. The proponents of the bill wished to protect the truck operators and truck drivers who have been beaten up by labor racketeers when driving their truck into the Holland Tunnel as in the Local 807 case. 91 Cong. Rec. 11908-11909. It was further argued that the bill was designed to suppress gangsters. 91 Cong. Rec. 11909-11910. After it was pointed out that this was not the first time the bill had passed, 91 Cong. Rec. 11909-11910, Mr. Hobbs, the sponsor, argued that conditions had deteriorated since 1943 noting that not only the price of the union wages for a day were being charged but in addition an initiation fee into the union was compelled. 91 Cong. Rec. 11912. Since World War II had terminated, Title II, the provision dealing with war-time interference with commerce was stricken. 91 Cong. Rec. 11918-11919. On December 12, 1945, the bill passed the House without division. 91 Cong. Rec. 11922.

On June 18, 1946, Mr. Hatch from the committee on the judiciary submitted this bill, H. R. 32, to the Senate with its report, S. Rep. No. 1516, 79 Cong., 2d Sess. (1946), also entitled "Amending the Antiracketeering Act". It simply stated, after recommending it be passed:[29]

> The purpose of this bill is to prevent interference with interstate commerce by robbery or extortion, as defined in the bill. Title I of this bill is an amendment of the existing law which was enacted in 1934. The objective of the amendments is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion.
>
> A conspiracy or attempt to do anything in violation of section 2, title I, is likewise made punishable, as is the commission or threat of physical violence to any person or property in furtherance of a plan to violate section 2.
>
> A penalty is prescribed of imprisonment for not more than 20 years or a fine of not more than $10,000, upon conviction of violating any section.

On June 21, 1946, it passed the Senate without debate. Mr. Hatch simply stated that this bill was the so-called anti-racketeering or so-called Hobbs bills that was passed by the Senate several days ago as an amendment to the so-called Case bill and that his only purpose was to have the Senate vote upon it. 92 Cong. Rec. 7308.

The 1946 bill was also a bill directed against the specific evil of racketeering. The main purpose of the bill was

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[29] On May 29, 1946, after the Senate tacked on the Anti-racketeering Act to H. R. 4908 entitled "an act to provide additional facilities for the mediation of labor disputes and for other purposes." Congress passed this bill, popularly known as the Case bill, but it was vetoed by the President on June 11, 1946. H. Doc. No. 651, 79th Cong., 2d Sess., 92 Cong. Rec. 6674-6678.

designed to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship. Much of the debate centered upon the effect of the bill upon union activities and upon the upset of the conspiracy conviction in the Local 807 case. Yet when Congressmen argued that the 20 year maximum penalty was too severe, Mr. Hobbs, the sponsor, agreed that this was the maximum. No one suggested that consecutive penalties might be imposed.

It was the Government's position, in opposing certiorari, that Congress by the organization of the statute in the 1934 and 1946 Acts intended that a violation of each section of the statute could be aggregately punished. That view leads to the conclusion that if all sections were violated by a single course of conduct, the wrongdoer would be subject to eighty years of imprisonment. This Congress "has not done so in words in the provisions defining the crime and fixing its punishment". **Bell v. United States**, 349 U. S. 81, 83. Its argument ignores the overlap of the various subsections in both the 1934 and 1946 Acts. For example, it treats as one conspiracy and concert of action. It overlooks the fact that concerted action may exist without a conspiracy because its constituents, aiding, abetting, counseling "are not terms which presuppose the existence of an agreement". **Pereira v. United States**, 347 U. S. 1, 11. Indeed the existence of a general aiding and abetting statute[39] further points to that the fact that Congress was merely trying to make certain every variety of offender was covered by the instant act.

3. **The 1948 Act.** The 1948 Act, which is applicable here, was changed during the revision of the Criminal Code. It substituted the words "attempts or conspires so to do" for the wording of the 1946 Act and omitted as unnecessary the words "participate in an attempt" and the

[39] 18 U. S. C. 1940 ed., § 550, R. S. §§ 5323, 5427.

words "or acts in concert with another or with others." There was no intent to change the meaning of its provisions. See Revisor's Note to 18 U. S. C. 1951.

II.

The Doctrine That Conspiracy and the Substantive Offense May Be Separately Punishable Does Not Preclude the Application of the Rule of Lenity.

At least the congressional intent as to cumulative punishment is ambiguous and therefore the policy of lenity should be applicable. **Bell v. United States**, 349 U. S. 81, 83-84; **Ladner v. United States**, 358 U. S. 169; **Heflin v. United States**, 358 U. S. 415. The doctrine that conspiracy and its substantive offense may be separately punishable does not preclude its application.

At the time of the enactment of the instant statute, there was no generalized judicial doctrine that a conspiracy and its substantive offense were to be aggregately punished. Rather the law was that such offenses were separate crimes. But, regardless of whether Congress intended aggregate punishment for a violation of the general conspiracy statute and for substantive offenses, it did not intend the Anti-Racketeering Act to provide such punishment.

The cases in which this Court has considered the issue of separability of conspiracy and substantive offense have arisen where the conspiracy was one created by the general conspiracy statute, now 18 U. S. C. 371, which from its enactment in 1867 until the revision of the Criminal Code in 1948 carried a maximum penalty of two years. The issue first arose in **United States v. Hirsch**, 1879, 100 U. S. 33. The question was whether counts drawn under the general conspiracy statute charging a conspiracy to violate the revenue laws were subject to the general statute of

limitations or to a special statute of limitations applicable to revenue offenses. The general conspiracy statute had been initially enacted in a revenue statute. This Court, in finding the general statute applicable, held that an offense punishable under the general conspiracy section was not a crime arising under the revenue laws even when the required overt act was one affecting the revenue laws. In **Clune v. United States**, 1895, 159 U. S. 590, defendants were indicted under the general conspiracy statute for a conspiracy to obstruct the mails. The substantive offense of obstructing the mail was merely punishable by a small fine. Defendants argued that the conspiracy could not be punished more severely than the substantive offense, contending that the conspiracy had merged into a completed substantive crime. Rejecting this argument, this Court held that under the general conspiracy statute, a conspiracy to commit an offense is denounced as a separate offense with a punishment fixed therein, that the wisdom of punishing the conspiracy more severely than the act itself was a matter for the legislature, and "the power exists to separate the conspiracy from the act itself and to affix distinct and independent penalties to each." The Court also concluded that upon the record it could not determine whether the conspiracy was merged in the completed act.

Carter v. McClaughry, 1902, 183 U. S. 365, involved an appeal in a habeas corpus proceeding in which the appellant was restrained of his liberty by a sentence imposed by a court-martial. He had been found guilty under charges of (1) conspiracy to defraud, (2) making false claims against the United States and (3) embezzlement. It was contended that his sentence for the first two charges constituted double jeopardy because the article of war under which they arose provided for an imprisonment or a fine and both sentences were imposed. The Court, while finding that the general sentence could be sustained under

the embezzlement count, also held there was no double jeopardy because of the sentence imposed on the first two counts and concluded that the court-martial had the power to punish appellant as to one offense by fine and as to the other by imprisonment. It noted that Congress had authorized both fine and imprisonment for committing one of these offenses and that, in transferring the offense to the military code, the word "and" was changed to "or."

In **United States v. Stevenson,** 1909, 215 U. S. 200, the punishment for the substantive offense was less than for the conspiracy. This court held, following **Clune,** that Congress had the power to affix a greater penalty for the conspiracy. **Heike v. United States,** 1913, 227 U. S. 131, rejected an argument that it was an abuse of discretion to permit a conspiracy conviction when the evidence showed that the substantive crimes had been committed, holding that "the liability for conspiracy is not taken away by its success." Finally, **United States v. Rabinowich,** 1915, 238 U. S. 78, held that a conspiracy to violate the bankruptcy act is not of itself an offense "arising under" the bankruptcy act and is therefore not governed by its short statute of limitations. The Court found that there was nothing unreasonable or inconsistent with the policy of the bankruptcy act to allow a longer limitation period for a conspiracy since it may be a greater evil than the commission of the contemplated crime.

The state of the law in 1934 in regard to offenses under the general conspiracy statute was: (1) a longer statute of limitations might be applied to the conspiracy than to the substantive offense; (2) even if the substantive offense was a misdemeanor or a petty offense, a conspiracy to commit it would subject the violator to a two year penalty; (3) a conspiracy was still punishable even though the intended crime was accomplished and (4) there was no double jeopardy for a military court-martial to impose

punishment of both imprisonment and a fine for conspiracy and the substantive offense under an article of war providing for imprisonment or a fine when Congress had authorized both punishments for a single offense.

There were no significant changes in judicial doctrine prior to the 1946 Hobbs Act. In **Braverman v. United States**, 1942, 317 U. S. 49, a single agreement to commit acts in violation of several penal statutes was held to be punishable at two years imprisonment, the maximum penalty for a single violation of the conspiracy statute rather than as several conspiracies.

Significantly, in 1944, when Congress increased the penalty for conspiracy to violate the counterfeiting laws, it did not recognize any doctrine of aggregate punishment applicable to a conspiracy and its substantive offense. Rather as noted in the Committee report, the need for a heavier conspiracy punishment was caused by the fact that in many cases criminal ringleaders were only subject to the two year conspiracy penalty when it was impossible to prove against them a substantive crime creating the anomolous situation that the minor offenders were subject to a severer sentence. The committee considered the 15 year penalty provided for violating the substantive offense as the maximum for violating the counterfeiting laws. H. R. Rep. No. 1039, 78th Cong., 2d Sess. (Appendix pp. 25-29).

On June 10, 1946, this Court decided **Pinkerton v. United States**, 328 U. S. 640, after the House had passed the Hobbs Act and shortly before the Senate passed that act without debate. But there is nothing to indicate that this case was brought to the attention of the Senate. The contention in that case was that the substantive offenses merged into a single conspiracy charge and that only a single sentence not exceeding the 2 year maximum provided by conspiracy statute might be imposed. This Court

refused to accept this merger argument. On the same day in **American Tobacco Co. v. United States**, 328 U. S. 781, 787-789, punishment for conspiracy to monopolize and conspiracy in restraint of trade in violation of the Sherman Act was considered not to be double jeopardy. Also rejected was an argument that conspiracy to monopolize and monopolization were dependent upon the same proof and were not separately punishable for that reason.[31]

Between 1946 and 1948, this court again merely recognized that a conspiracy under the general statute and its substantive offense are distinct crimes. **United States v. Bayer**, 331 U. S. 532, 541-543; **Sealfon v. United States**, 332 U. S. 575, 578.

The 1948 revision of the criminal code increased the punishment for violating the general conspiracy statute from two to five years. While this section excluded certain specific conspiracies for the purpose of providing a heavier punishment, the Hobbs Act was not so excluded. The Reviser's notes stated in part:

> "A number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title, were omitted because adequately covered by this section. A few exceptions were made, (1) where the conspiracy would constitute the only offense, or (2) where the punishment provided in this section would not be commensurate with the gravity of the offense. Special conspiracy provisions were retained in Sections 241, 286, 372, 757, 794, 956, 1201, 2271, 2384 and 2388 of this

[31] The *Pinkerton* case also ended a conflict between circuits by concluding that a conspirator may be found guilty of the substantive crime if that crime is committed in furtherance of the substantive offense even though he does not participate in that offense. The result was that a ringleader could be convicted of the substantive offense in which he did not directly participate and that all parties to a crime were subject to the same penalty.

title. Special conspiracy provisions were added to Sections 2153 and 2154 of this title."

It follows that this court is again dealing "with a unique statute of limited purpose" which should be within the policy of **Prince v. United States**, 352 U. S. 322, 325, 329, "of not attributing to Congress, in the enactment of criminal statutes, or intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."

III.

The Validity of Consecutive Sentences on Two Counts of an Indictment May Be Raised by Motion After Affirmance of the Conviction.

The Court below held: "Appellant's motion whether based upon Rule 35 or Section 2255, supra, cannot serve as an appeal. The questions now sought to be litigated could have been urged by him on appeal from his conviction and hence he cannot collaterally attack the judgment of conviction and sentence by motion" (R. 39-40). But the government has conceded that since the claimed illegality in the sentence appears from the face of the indictment and judgment, the sentence is one which may be corrected on collateral attack. This was established as far back as **Ex parte Large**, 18 Wall. 163, and **In re Snow**, 120 U. S. 274. Rule 35, F. R. Crim. P., itself provides that "the Court may correct an illegal sentence at any time." Recently, in **Heflin v. United States**, 358 U. S. 415, 417-418, this Court held that such a motion to correct lies. The **Heflin** case impliedly finds the doctrine of res judicata inapplicable by concluding that "successive motions may be made under Rule 35." The defendant there had also taken a direct appeal. This Court in other instances has reached and decided issues concerning the legality of the length

of a sentence, although the questions were raised by collateral attack on consecutive sentences. **Prince v. United States**, 352 U. S. 322; **Gore v. United States**, 367 U. S. 386. Although the defendants in those cases had been tried and convicted but did not institute a direct appeal, we see no distinction between a defendant who appeals and one who does not directly appeal his conviction. Both could have litigated any question concerning the length of their sentence on direct appeal. One reason why defendants in both categories may litigate that issue on collateral attack is that such sentence may be corrected "at any time." Furthermore, it would be unjust to imprison any individual beyond the length of time that Congress had designated as the maximum period for a certain type of wrongful conduct.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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